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No. 09-298

Supreme Court, U.S.
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In The
Supreme Court of the United States

KENNETH L. BLUM,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, Robert A. Sturgell, Acting Administrator; NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourth Circuit affirmed the National Transportation Safety Board which had confirmed the oral decision of the Administrative law Judge. This case dealt with a violation which occurred in the restricted zone which includes the Baltimore Washington Area. The decision in this case directly conflicts in part with a decision in the District of Columbia Circuit. The decisions in both case conflict with the rules, regulations and agreements promulgated by the Agencies in question.

Judge Roberts (Circuit Judge) said in (*Ramaprakash v. FAA & NTSB*, 346 F.3d 1121 (DC Cir. 2003), "Learned Hand once remarked that agencies tend to "Fall into grooves,... and when they get into grooves, then God save you to get out," And then he said "Judge Hand never met the National Transportation Safety Board...because the Board has failed adequately to explain its departures from its own precedent ...

The Accardi Doctrine expounded in *United State ex el. Acardi v. Shaughnesy*, 347 U.S 260 basically says that federal agencies have to abide by there own rules and regulations

Two questions are presented:

1. In this case the main question is who is pilot-in-command of an aircraft? In the regulations the rule is that anyone who is not current in their bi-annual review cannot be a pilot in command. The District of Columbia Circuit

Court upheld *Sturgell v. Moeslein, Jr.* and said the flight instructor is always deemed to be the pilot-in-command. In this case the pilot was not current because he had not renewed his bi-annual flight check and was taking paid instruction from a flight instructor. The NTSB and the Fourth Circuit Court on review held that the pilot was in command, a complete reversal of the NTSB rules and regulations.

a. The rulings in this case is arbitrary and capricious because the NTSB tries to speak out of both sides of its mouth at the same time in making a rule that the instructor is always the pilot-in-command , that a pilot who is not current under it bi-annual rules cannot be pilot-in-command and then says that Blum was pilot-in-command.

2. When the federal agency enters into an agreement (Aviation Safety Reporting Program) with another federal agency and agrees that if people that deal with the agency in reporting problems are entitled to the waiver of penalties only when they follow the procedures and meet the qualifications and are then denied their due process and are prejudiced when they file appeals to the NTSB and have a hearing before a Administrative Law Judge. This is extortion in that if you do not file an appeal then we abide by the rules, but if you dare to file an appeal then we will not abide by the rules.

LIST OF PARTIES TO THE PROCEEDING

All parties in this case are listed in the caption of the case.

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. See Appendix 1a to 5a. And the opinion of the NTSB is at Appendix 5a to 15a.

The conflicting opinion is of the United States Court of Appeals for the District of Columbia. See Appendix 28a to end.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Fourth Circuit's opinion was rendered on June 10, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INOLVED

1. Amendment IX: The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

2. Federal Aviation Regulations: 61.56(c) ... No person may act as pilot in command of an aircraft unless, since the beginning of the 24th calendar month before the month in which that pilot acts as pilot in command that person has 1. Accomplished a flight review given in an aircraft for which that pilot is rated by an authorized instructor; and 2. A logbook endorsed from an authorized instructor who gave the review certifying that the person has satisfactorily completed the review.

STATEMENT OF THE CASE

The Petitioner is a licensed pilot who on 1-4-2004 had performed his flight review (usually called a BFR) in accordance with the Federal Aviation Regulations 61.56. On 3-27-2006 more than two years later he went to Chesapeake Proflight a company located at the BWI airport that rented the Cirrus SR20 airplane and provided flight training. He rented the aircraft and was assigned the chief flight instructor. The flight instructor filed the necessary flight plan and gave Blum instructions on how to fly the aircraft. The aircraft was flown out of the restricted zone and on the way back a violation occurred which is not being contested. The paid instructor signed the log book describing the activities of the flight but did not sign Blum off to fly the aircraft or to renew his BFR. The instructions continued until 7-25-2006 when the instructor finally signed Blum off to fly the Cirrus SR20 and approved his BFR which allowed him under FAR 61.56 to be pilot in command of the aircraft. (Appendix 26a)

The rule that has been set out by the FAA and NTSB is that the instructor is always the pilot-in-command. (*See FAA v. Moeslein*, App. 28a to 44a at 40a, *Administrator v. Hamre*, 3-NTSB 28)

The FAA charges Blum and the NTSB affirmed with the violation set out in its "Order of Suspension, you acted as pilot in command of civil aircraft N657CD."

Blum in accordance with Aviation Safety Reporting Program filed a timely NASA report within the ten day period. The FAA was aware of the report on 3/31/06, and made a proffer to the Court that "It appears to be timely, yes, but when we get these, we take it into consideration. We don't take it into consideration on the day of a hearing." "This is the first time we're seeing this." The Court ruled that Blum was "careless" when a determination that Blum was acting intentionally is the test set out in the Aviation safety Reporting Program and refused to honor the NASA report and placed sanctions of a 30 day suspension on the Blum.

REASON FOR ALLOWANCE OF THE WRIT

1. REVIEW IS WARRANTED TO RESOLVE NOT ONLY A CONFLICT BETWEEN TWO CIRCUITS BUT ALSO A CONFLICT WITHIN AN AGENCY ITSELF

A. The Fourth Circuit and the DC Circuit have come to different Conclusions and one has affirmed the NTSB by saying that the Pilot-in-command is always the instructor in the aircraft and the other has said that the pilot not the instructor is the pilot-in-command of the aircraft under almost the same facts. In the DC Circuit Case the instructor was not being paid but just a friend flying with the pilot. In the Fourth Circuit case (this case) the instructor was being paid, the pilot was not certified because his Bi-annual review was not current and he could not be pilot-in-command, however he was held to be pilot-in-command. How is

anyone using the system going to understand anything if the agency can change its mind without any reason? Either an instructor giving lessons or just flying with a pilot is the pilot-in-command or a pilot who is with the instructor is pilot-in-command. This just doesn't make sense and is reason alone for this writ to be granted.

B. 2. Whether the FAA and the NTSB made a arbitrary, capricious and prejudicial error when it refused to accept the Aviation Safety Reporting Programs NASA report form that was timely filed by the Petitioner after it determined that he was the pilot in command and opined that the action that occurred was careless, despite that the FAA on the record said that if it would have known that a NASA report had been filed it would have acted differently even though it had knowledge from the beginning of the action that a NASA report had been filed.

Advisory Circular 00-46D (see addendum) sets out the requirements and reasons for the Aviation Safety Reporting Program. The Circular also sets out the criteria when a certificate suspension will not be imposed. The criteria in Paragraph 9(c)(1) which states "the violation was inadvertent and not deliberate". The ALJ opined that the violation was careless. Careless is not deliberate and when there is a paid flight instructor in the aircraft that is giving lessons and the PIC then the obvious questions is. Was the flight instructor doing her job and monitoring Blum and if the flight instructor was then did both of the parties in this action act in a deliberate manor or does common sense direct that

any action committed by either party was not deliberate but inadvertent and careless.

CONCLUSION

If Judge Learned Hand and Judge Roberts are correct as quoted in *Ramapakash v. NTSB*, the NTSB hasn't listened and I would hope a decision in this Court should get it's attention and for all the foregoing reasons, petitioner respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

*/s/*_____

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September 8, 2009

FILED: June 10, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1324
(SE-18012)
(EA-5371)

KENNETH L. BLUM,

Petitioner

v.

FEDERAL AVIATION ADMINISTRATION,
Robert A. Sturgell, Acting Administrator;
NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents

J U D G M E N T

In accordance with the decision of this Court, the petition for review is denied.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[FILED: JUNE 10, 2009]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1324

KENNETH L. BLUM,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Robert A. Sturgell, Acting Administrator;
NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents.

On Petition for Review of an Order of the National Transportation Safety Board. (SE-18012)

Submitted: May 18, 2009 Decided: June 10, 2009

Before MOTZ, KING, and AGEE, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Jay Fred Cohen, Baltimore, Maryland, for Petitioner. James F. Conneely, FEDERAL AVIATION ADMINISTRATION, Washington, D.C., for Respondents.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kenneth L. Blum petitions for review of the National Transportation Safety Board's decision and order affirming the Administrative Law Judge's order affirming the suspension of Blum's pilot certificate. Our review of the record discloses that the Board's decision is based upon substantial evidence and is without reversible error. Accordingly, we deny the petition for review for the reasons stated by the Board. Sturgell v. Blum, Docket SE-18012, Order No. EA-5371 (NTSB March 5, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

SERVED: March 5, 2008

NTSB Order No. EA-5371

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of February, 2008

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration,	)	
Complainant,	)	
v.	)	Docket No. SE-18012
KENNETH L. BLUM,	)	
Respondent.	)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued August 9, 2007, at the conclusion of an

evidentiary hearing.[1] By that decision, the law judge upheld the Administrator's allegation that respondent violated 14 C.F.R. §§ 91.139(c), 99.7, 91.131(a)(1), and 91.13(a) of the Federal Aviation Regulations (FAR),[2] and affirmed the 30-day suspension of respondent's private pilot certificate. We deny respondent's appeal.

The Administrator's April 13, 2007 order, which served as the complaint in this proceeding, alleged that on March 27, 2006, respondent was pilot-in-command (PIC) of a Cirrus SR-20, number N657CD, on a flight inbound to the Baltimore-Washington International Airport (BWI), Maryland. The order alleged that respondent did not comply with the special security procedures and flight rules of NOTAM 6/2550, in effect for the airspace within the Washington, D.C. ADIZ. The order also alleged

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[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

[2] Section 91.139(c) states that when a NOTAM (Notice to Airmen) is issued under § 91.139, "Emergency Air Traffic Rules," no person may operate an aircraft within the airspace so designated except in accordance with the conditions, authorizations, and terms in the regulation covered by the NOTAM. Section 99.7 requires compliance with special security instructions, issued by the Administrator in the interest of national security by agreement with the Department of Defense or a Federal security or intelligence agency, in addition to other rules in Part 99, "Security Control of Air Traffic," when operating in an ADIZ (air defense identification zone). Section 91.131(a)(1) states that, before operating an aircraft within Class B airspace, a pilot must first receive air traffic control (ATC) clearance from the ATC facility having jurisdiction. Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another.

that respondent did not obtain a clearance to enter the Class B airspace at BWI before doing so and that respondent's operation of the aircraft in violation of these requirements constituted a careless or reckless act that would endanger the lives and property of others.

At the hearing, the Administrator presented the testimony of Angelo Sorrentino, support manager for quality assurance at the Potomac Terminal Radar Approach Control (PTC) located in Warrenton, Virginia. Mr. Sorrentino identified an air traffic plot of the radar data showing the course flown by N657CD on March 27, 2006. Exh. A-1. He also identified a transcript of ATC radio tapes regarding this incident, and the PCT ADIZ transcript of a telephone conversation with respondent. Exhs. A-2, A-3. Exhibit A-1 includes a matrix with data showing the transponder beacon code transmitted by N657CD. ATC assigned 4701 to N657CD as its ADIZ discrete beacon transponder code. According to the radar plots, N657CD was transmitting 1200 for 65 seconds, or $2^{1/2}$ miles, after entering the ADIZ. When PCT advised N657CD that it did not observe the discrete code, respondent said that he was squawking 4710 (but even 4710 was the wrong code, he should have been squawking 4701), when he was actually still squawking 1200.

PCT ATC Specialist Jeffrey Sparrow testified that when he noticed N657CD was squawking 1200, he asked respondent about his position. Mr. Sparrow then noticed that "at that point it rolled over to a 4710 squawk." By that time, N657CD was in Class B airspace, and Mr. Sparrow asked N657CD to

descend below Class B airspace. Respondent did not begin squawking the correct code (4701) until he re-entered Class B airspace, which was almost 3 minutes after entering the ADIZ. Mr. Sparrow testified that N657CD did not receive a clearance to enter Class B airspace before doing so.

Aviation Safety Inspector Richard Eilinger testified that his office prepared the Enforcement Investigative Report in this case, and that NOTAM 6/2550 was in effect on March 27, 2006. He opined that respondent was the PIC, but confirmed that he did not have to be the PIC to violate the rules regarding ADIZ and Class B airspace; it was enough that respondent simply operated or flew the aircraft. Mr. Eilinger identified the FAA Sanction Guidance Table, and indicated that the sanction guidance for the ADIZ violation was 30 to 90 days. He said that respondent told him on March 31, 2006, that he had filed an Aviation Safety Reporting Program (ASRP) report.

Respondent testified at the hearing that he had about 250 flying hours at the time of the incident. He said that this was his first time to fly in a Cirrus aircraft and the first time to fly with this instructor in this initial training flight to get checked out in that particular aircraft. Respondent testified that the instructor filed the flight plan, and that this was respondent's first time to fly out of BWI in 25 years, so the instructor was also instructing him on how to fly in and out of BWI in light of the ADIZ rules. Respondent said that he and the instructor preflighted the aircraft and the instructor assisted in taxing to the runway.

Although disputing that he was the PIC, respondent admitted that he operated or flew the aircraft in the Class B and ADIZ airspace. Respondent offered Exhibit R-4, a report riled pursuant to the ASRP.[3]

After considering the evidence, the law judge held that respondent violated the FAR as alleged. He rejected the defense that respondent was eligible for a waiver of sanction based on his filing of an ASRP report, finding that the violations were not inadvertent.[4]

Respondent argues that the Administrator did not meet his burden of proving that respondent was the PIC. He also argues that the law judge erred when he "refused to accept the NASA report." The Administrator opposes these arguments and urges us to affirm the law judge's decision.

Respondent's appeal brief states that the "determinative issue...is who was the pilot in command of the aircraft when the individual in the left seat was receiving dual instruction on how to

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[3] Under the ASRP, sanction may be waived, despite the finding of regulatory violation, if certain requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c. This program involves filing a report with the National Aeronautics and Space Administration (NASA) concerning a FAR violation. Such filing will obviate imposition of sanction if: (1) the violation was inadvertent and not deliberate; (2) it did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in an enforcement action to have committed a regulatory violation in the past 5 years; and (4) the person mails a report of the incident to NASA within 10 days.

[4] See footnote 3 above subparagraph (1).

operate the aircraft and the other seat was [] an individual who was holding herself out to be a "re-certified master flight instructor'..." Respondent's Br. at 2 (emphasis omitted). Respondent does not recognize, however, that the decision in this case does not rest on the determination of who was the PIC.

At the hearing, respondent's counsel referred to an ADIZ case he had recently defended, and which this Board has since decided.[5] In that case, the respondent was a certified flight instructor (CFI) on an instructional flight and respondent's counsel argued that respondent was not the PIC. Although we found that respondent was the PIC, and we discussed the issue at some length, we must point out that the PIC issue was not the determinative issue in that case because, regardless of whether the respondent was the PIC, he committed a violation by his operation of the aircraft, without regard to whether he was "in command." For same reason, the PIC issue is also not determinative in our decision here.

As Mr. Eilinger testified, and as the Administrator points out in his reply, in order to establish violations in this case, all that need be shown is that respondent operated or flew the aircraft in the Class B and ADIZ airspace. The Administrator has done that, and respondent does not contest the fact that he so operated the aircraft. Further discussion on this issue, therefore, is unnecessary. We find that respondent violated the

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[5] See Administrator v. Moeslein, NTSB Order No. EA 5354 (2008)

regulations as alleged. Although the Administrator undertook to show also that respondent was the PIC, the Administrator has not been able to do so, primarily because this was an instructional flight and an instructor was on board.[6] We conclude that respondent was not the PIC; the law judge's initial decision should be modified accordingly.

Whether the Administrator could prove that a pilot is the PIC in a case like this is another question, but we have long held that an instructor is in PIC on an instructional flight,[7] and that the PIC is not necessarily the pilot who operates the controls or directs the course of a flight.[8] As respondent points out, the other pilot on this flight was a CFI who filed the flight plan, signed respondent's logbook as CFI, and then, 3 months and 6 flights following the flight at issue, signed respondent's logbook with the notation: "SR20 transition trng [training] complete-BFR (biannial flight review)." Exh. R-2.

Whether respondent relied on his instructor is a defense that respondent did not affirmatively raise. Respondent might have relied on the pilot with the superior certificate to obtain the discrete transponder beacon code and to ensure that the aircraft was squawking that code; to comply with the conditions, authorizations, and terms of the

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6 See discussion below.

7 Administrator v. Hamre, 3 NTSB 28, 31 (1977); see also Administrator v. Stroebel, NTSB Order No. EA-4384 (1995).

8 Administrator v. Jeffreys, 4 NTSB 681, 682 (1982); see also Administrator v. Funk, NTSB Order No. EA-2915 (1989).

NOTAM; to comply with the special security instructions of the ADIZ; and to receive an ATC clearance before entering Class B airspace. But he fails to make that argument. Respondent might have raised an affirmative defense of reasonable reliance.[9] We do not normally entertain, however, arguments, that are not presented to us. Although respondent has not raised this as a defense, to avoid a later assertion that it was raised based on the evidence and the appeal brief, we address it only to the extent of noting that as the record stands, respondent did not meet the conditions of defense. By way of illustration, as a qualified, certificated pilot and, here, the flying pilot, respondent had an independent duty to comply with the requirements of the airspace in which he operated.

Respondent argues that the law judge erred when he did not accept respondent's ADRP defense, and contends that the violations were inadvertent. We note that respondent did not raise this defense in his answer to the complaint. We treat respondent's assertion that he is eligible for a waiver of sanction under the ASRP as an affirmative defense.[10] In

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[9] We have held, in a multi-crew aircraft, for example, that while a PIC may be otherwise responsible for overall safe operation of the aircraft, if a task is the responsibility of another or if the PIC has no independent obligation or ability to intervene, and he has no reason to question the performance of the other, then we may find no violation. See Administrator v. Fay and Takacs, NTSB Order No. EA-3501 (1992). The rationale of that opinion is applicable in other cases as well.

[10] See Moeslein, supra, citing Administrator v. Smith, 5 NTSB 1560, 1564 (1986); accord Administrator v. Baehr, NTSB Order No. EA-4075 (1994).

asserting an affirmative defense, respondent must fulfill the burden of proving both the factual basis for the defense and the legal justification.[11] He must satisfy the burden of establishing that he meets all criteria of the ADRP, and is therefore eligible for a waiver of sanction. Respondent has not done so. He argues only that his violation was inadvertent and, at the hearing, presented evidence only that his report was timely, but not evidence to show that he fulfilled the remaining criteria.[12] Even had he presented evidence on the other criteria, however, we find that respondent has not produced sufficient evidence to dispute the finding that has violations were not inadvertent. We are reminded of the discussion regarding the distinction between the terms "inadvertent" and "not deliberate," as discussed in the seminal case of Administrator v. Ferguson and Bastiani, 3 NTSB 3068 (1980), where we held that a violation must be both "not deliberate" and "inadvertent" for immunity to apply. In affirming our decision, the United States Court of Appeals for the Ninth Circuit used the following for illustration:

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[11] See Administrator v. Gibbs, NTSB Order No. EA-5291 at 2 (2007); Administrator v. Kalberg, NTSB Order No. EA-5240 at 3 (2006); Administrator v. Tsegaye, NTSB Order No. EA-4205 at n. 7 (1994).

[12] We note that there is some evidence that respondent had no violation history, but he presented no argument on this.

> A person who turns suddenly and spills a cup of coffee has acted inadvertently. On the other hand, a person who places a coffee cup precariously on the edge of a table has engages in purposeful behavior. Even though the person many not deliberately intend the coffee to spill, the conduct is not inadvertent because it involves a purposeful choice between two acts-placing the cup on the edge of the table or balancing it so that it will not spill. Likewise, a pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to consult his instruments to verify his altitude.

Ferguson v. NTSB and FAA, 678 F.2d 821, 828 (9th Cir. 1982). The very same rationale applies here. Whether he intended to violate the FAR, respondent was not unaware that he was flying into restricted airspace. That he chose not to ensure that he was complying with the restrictions and limitations of that airspace does not transform his actions from deliberate or advertent to not deliberate or inadvertent. We find that respondent is not eligible for a waiver of sanction under the ASRP.

We find that safety in air commerce or air transportation and the public interest require us to affirm the order of suspension and the decision of the law judge, as we have modified them.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's initial decision is affirmed as modified herein; and

3. The 30-day suspension of respondent's private pilot certificate shall begin 30 days after the service date indicated on this opinion and order.[13]

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and, CHEALANDER, Members of the Board, concurred in the above opinion and order.

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[13] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

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ADMINISTRATIVE LAW JUDGE FOWLER: Thank you very much, Mr. Trainor and Mr. Cohen, for your - arguments on behalf and with respect to the clients. As I indicated earlier, I'm going to issue an initial decision in this proceeding. I'm going to take little time to review the testimony and the notes that I have here. It is now 1:50. We will reconvene -- give me 45 minutes. That will be enough time for me to refresh and maybe have a quick lunch or something. There are three or four different places right in this building where you can get a lunch, from a full meal to a sandwich. It's 1:50. We'll reconvene at 2:40. That should give you enough time.

(Off the record.)

(On the record.)

ADMINISTRATIVE LAW JUDGE FOWLER: As I indicated earlier, I'm going to issue an Oral Initial Decision. I will ask Mr. Levin, our reporter, to caption this Oral Initial Decision and Order.

ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board, pursuant to the provisions of the Federal Aviation Act of 1958 as that act was subsequently amended, on the appeal of Kenneth L. Blum on an Order of Suspension dated April 13th, 2007, which seeks to suspend Respondent Blum's Private Pilot's Certificate No. 214642992 for a period of 30 days.

The Administrator's Order of Suspension duly promulgated pursuant to the National Transportation Safety Board's rules of practice in air safety proceedings as issued here by the Enforcement Division of the Chief Counsel's Office of the Federal Aviation Administration has been heard before this United States Administrative Law Judge. And as it is provided by the Board's Rules of Practice, specifically Section 821.42 of those rules, as the Judge in this proceeding, I have chosen to invoke the option granted to me under that section and issue an oral and initial decision forthwith at this time as opposed to a subsequent written decision.

Following notice of the parties, this notice came on for trial in Washington, D.C. on August 9th, 2007, as I stated in Washington D.C. The Respondent Kenneth L. Blum was very ably represented by Jay Fred Cohen, Esquire. The Federal Aviation Administration was likewise very ably represented by Tim Trainor, Esquire and Susan Caron, Esquire of the FAA's Enforcement Division Chief Counsel's Office.

Both parties have been afforded the opportunity to offer evidence, to call, examine, and cross-examine witnesses. In addition, the parties were afforded the opportunity to make argument in support of their respective positions.

I have reviewed the testimony and the evidence in this proceeding, which consists of three witnesses on behalf of the Administrator. One witness on behalf of the Respondent, and the other was the Respondent himself. Six exhibits introduced

by the Administrator and four exhibits by the Respondent, all duly admitted into the hearing record of this proceeding as is presently constituted.

The issues to be decided here, of course, in this Order of Suspension of April 13th, 2007, is the Administrator has alleged the incursion into the ADIZ as set forth in FDC NOTAM 6-2550, as well as the allegation that there was an incursion into the Class B airspace in this area.

It is my determination and conclusion that the Administrator's case, strong, clear, impelling, logical, and in other words, a very persuasive case. The Administrator's three witnesses, Mr. Sorrentino, Mr. Sparrow and Inspector Richard Eilinger; I believe Mr. Sorrentino and Sparrow monitored the ADIZ as part of their official and daily duties, and you might say they were direct witnesses to the incursion without the proper compliance with the restrictions imposed because of security procedures and precautions that Respondent Kenneth L. Blum did not observe in his incursion into the ADIZ governed by NOTAM 6-2550 on March 27th, 2006.

Now, as I said, these three witnesses' testimony was very, very logical, compelling and persuasive. I was impressed by Aviation Safety Inspector Eilinger, who on the record was designated as an aviation safety expert in aviation matters. And I cannot differ with or negate his determinations. And while we have, as the Administrator's Order of Suspension spells out, two incursion here, one of the ADIZ and one of the Class B airspace, Inspector Eilinger said in his opinion the evasion or the

incursion of the ADIZ was inadvertent by Respondent Blum, but that the incursion of the Class B airspace was deliberate and intentional.

As you may have gathered by the gist of my statements so far in determination about the overwhelming evidence that the Administrator has adduced, the sanctions sought by the Administrator of 30 days is the minimum sanction that can be opposed here, it certainly could have been much more because, as the documentary exhibits setting forth the sanctions that the Administrator is empowered to impose, this could be anywhere from 30 on up to 100 days, I think it is. And I think the Administrator has been very thoughtful in seeking the sanction that the Administrator seeks to impose.

Unfortunately, I cannot find anything particularly mitigating here. And in view of the totality of the evidence, I would not, even if desired to, reduce the sanction here of 30 days, which is the minimum sanction, taking into account all of the facts and circumstances.

Now, the Respondent attempted to make much of the fact that Respondent Blum was not the pilot-in-command on this flight on March 27th, 2006. That, in my estimation, based on the totality of the evidence, has not only been successfully rebutted but it is shown by the evidence, and particularly by the aviation expert Eilinger, that not only was Respondent Blum the operator of the aircraft that he was, in fact, the pilot-in-command of the aircraft.

And I think the Administrator was certainly very well premised in bringing this action, because as well all know here, the only time an aircraft goes into an ADIZ zone without getting clearance or without having a beacon transponder code on, and without receiving a separate clearance to enter the ADIZ, is when he is in violation in being in the ADIZ. And this ADIZ here in this area, as well as the Class B airspace, is heavy with traffic. So the mere fact that Mr. Blum was in the ADIZ and the Class B, his aircraft being there constituted a hazard.

Squawking the beacon code on his transponder of 1200 before he entered the ADIZ, there is nothing wrong here, but he went into the ADIZ on that code and subsequently received the proper code of 4701, the code assigned to him after he entered the ADIZ. He was in the ADIZ for about seven miles when he exited and then subsequently went into Class B airspace without first obtaining a clearance.

So, ladies and gentleman, as I stated a moment ago, the Administrator's case is very, very clear and compelling and the evidence is quite persuasive and I cannot do otherwise than to affirm the Administrator's Order of Suspension of April 13th, 2007.

Accordingly, I will now proceed to make the specific findings of fact and conclusion of law:

One, it is found that the Respondent in this proceeding, Kenneth L. Blum, holds Pilot's Certificate No. 214642992.

Two, it is found that under Section 91.39 of the Federal Aviation Regulation, the Administrator has established a special security procedure that are under air traffic rules for flights in the Washington, D.C. metropolitan area where ready identification, location and control of aircraft is necessary for reasons of national security. These procedures and air traffic rules were published in the flight data center FDC Notice to Airmen, ordinary none NOTAM 6-2550, effective March 1, 2006, until further notice, which established the Washington, D.C. metropolitan area defense identification commonly known as the DC ADIZ.

Three, it is found that on March 27th, 2006, Respondent Blum, acting as pilot-in-command of civil aircraft N657CD, a Cirrus SR-20, in a flight inbound to the Baltimore Washington International Airport in Maryland.

Four, it is found that FDC NOTAM 6-2550 was in effect March 27th, 2006.

Five, it is found that FDC NOTAM 6-2550 requires in part a pilot must a) transmit a discreet transponder code at all times while operating in the DC ADIZ, and b) properly be operating within Class B airspace, that is within the DC ADIZ receive a separate clearance to enter the Class B airspace.

Six, it is found that during the flight on March 27th, 2006, Respondent Blum operated his aforesaid aircraft in 657 CD contrary to the security procedures, the flight rules established by NOTAM 6-2550 and that at approximately 14:58 local time,

Respondent operated the aforesaid aircraft within the airspace covered by the aforesaid NOTAM without transmitting Respondent's assigned discreet transponder code. And, b) before operating within Class B airspace that lies within the D.C. ADIZ, Respondent failed to obtain a separate clearance to enter that Class B airspace.

Seven, it is found that by operation of an aircraft within the aforementioned ADIZ, when not complying with the special security procedures, established, in the aforesaid NOTAM, that this constituted a careless act that could potentially endanger the lives or property of others.

Eight, it is found the reason of the foregoing facts and circumstances that Respondent, Kenneth L. Blum, violated the following Federal Aviation Regulations: a) Section 91.139I, I'm incorporating by reference as set forth in the Administrator's Order of Suspension what that section spells out; b) a violation of Section 99.7, also incorporating by reference as to what that section spells out in the Order of Suspension; c) Section 91.131(a)(1), incorporating by reference as well what that section spells out; and d) Section 91.13(a), in that the Respondent operated an aircraft in a careless manner so as to potentially endanger the life and property of another.

Nine, safety and air transportation and air commerce and the public interest does require the affirmation of the Administrator's Order of Suspension dated April 13th, 2007. In view of the Respondent's violation of Section 91.139I, Section

99.7, Section 91.131(a)(1), and Section 91.13(a) of the Federal Aviation Regulations as set forth earlier in the decision that I'm in the process of issuing.

ORDER

It is ordered, adjudged, and decreed that the Administrator's Order of Suspension dated April 13th, 2007, be, and the same hereby, affirmed.

WILLIAM E. FOLWER, JR.

Administrative Law Judge

APPEAL

Either party may appeal the Judge's Oral Initial Decision just issued. The Appellant must file his Notice of Appeal within ten days of the Judge's decision, which is dated August 9th, 2007.

And for the Appellant to perfect his appeal, he must file a brief within 60 days following the date of the Judge's decision, setting forth his objections to the Judge's Oral Initial Decision.

A Notice of Appeal and the brief may be filed with the

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AC NO: OO-46D

Subject: Aviation Safety Reporting Program

Date: 2/26/97
Initiated by: AFY-300

1. Purpose

This circular describes the Federal Aviation Administration (FAA) Aviation Safety Reporting Program (ASRP) which utilizes the National Aeronautics and Space Administration (NASA) as a third party to receive Aviation Safety Reports. This cooperative safety reporting program invites pilots, controllers, flight attendants, maintenance personnel, and other users of the National Airspace System (NAS), or any other person, to report to NASA actual or potential discrepancies and deficiencies involving the safety of aviation operations. The operations covered by the program include departure, en route, approach, and landing operations and procedures, air traffic control procedures and equipment, crew and air traffic control communications, aircraft cabin operations, aircraft movement on the airport; near midair collisions, aircraft maintenance and recordkeeping, and airport conditions or services. The effectiveness of this program in improving safety depends on the free, unrestricted flow of information from the users of the NAD. Based on information obtained from this program, FAA will take corrective action as necessary to remedy defects or deficiencies in the NAS. The reports may also provide data for

improving the current system and planning for a future system.

2. Cancellation

Advisory Circular 00-46C dated February 4, 1985, is cancelled.

b. **Background**

b. The Primary mission of the FAA is to promote aviation safety. To further this mission, the FAA instituted a voluntary ASRP on April 30, 1975, designed to encourage the identification and reporting of deficiencies and discrepancies in the system.

b. The FAA determined that the ASRP effectiveness would be greatly enhanced if the receipt, processing, and analysis of raw data were accomplished by NASA rather than by the FAA. This would ensure the anonymity of the reporter and of all parties involved in a reported occurrence or incident and, consequently, increase the flow of information necessary for the effective evaluation of the safety and efficiency of the system. Accordingly, NASA designed and

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1981 WL 605618 (D.O.T.)
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(Cite as: 1981 WL 605618 (D.O.T.))

Department of Transportation (D.O.T.)

Federal Aviation Administration

Legal Interpretation

*1 Interpretation 1981-31
April 9, 1981

Dennis Dove

This is in response to your mailgram of January 27, 1981, in which you request interpretation of the biennial review requirements, Section 61.57 of the Federal Aviation Regulations. You ask two specific questions, one of which was also asked in your mailgram of January 8, 1981. Our response to that inquiry apparently crossed in the mail with your January 27 mailgram. For your convenience that first question is again answered in this letter.

You asked whether a pilot whose biennial has expired may act as pilot-in-command during his biennial flight review, with the certified flight instructor (CFI) riding as "pilot observer" only? Second, does a CPI who is giving a biennial have the responsibility of checking the pilot's logbook to determine whether the pilot's previous biennial has expired?

Section 61.57 provides requirements for recent flight experience. Under Section 61.57(a) no pilot may act as pilot-in-command of an aircraft unless within the preceding 24 months the pilot has satisfactorily accomplished a flight review by an appropriately certified instructor and had his logbook so endorsed. This is commonly referred to as a "biennial flight review," or a "biennial".

In answer to your first question, Section 61.57(a) clearly states that no pilot may act as pilot in command unless he or she has completed a flight review within the past 24 months. Thus, if the biennial has expired, the pilot may not act as pilot in command during the biennial flight review.

In answer to your second question, the Federal Aviation Regulations do not require the CFI to inspect the pilot's logbook for previous biennials. It is the pilot's responsibility to determine when a biennial flight review is due.

Edward P. Paberman

Assistant Chief Counsel

1981 WL 605618 (D.O.T.)

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SERVED: January 18, 2008

NTSB Order No. EA-5354

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATON SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL
TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, Complainant,	)	
v.	)	Docket No. SE-17813
DAVID LEE MOESLEIN, JR., Respondent.	)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision and order of Chief Administrative Law Judge William E. Fowler, Jr., issued January 30,

2007.[1] The Administrator's order suspended respondent's airline transport pilot (ATP) certificate for 90 days, based on alleged violations of the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 91.13(a), 91.139(c), 91.215(c), and 99.7.[2] The law judge concluded that the Administrator proved all allegations in the order of suspension, and that respondent violated each FAR section cited. We deny respondent's appeal.

The Administrator's August 31, 2006 order, which served as the complaint in this proceeding, alleged that on July 10, 2004, respondent was pilot-in-command (PIC) of a Piper PA-28R-201, number N27GS, on an instructional flight that departed from and then returned to Martin State Airport (MTN), Maryland. The Administrator alleged that

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[1] A copy of the initial decision, an excerpt from the hearing transcript is attached.

[2] Section 91.13(a) states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another. Section 91.139(c) states that when a NOTAM (Notice to Airman) has been issued under § 91.139, "Emergency Air Traffic Rules," no person may operate an aircraft within the designated airspace except in accordance with the conditions, authorizations, and terms prescribed in the regulation covered by the NOTAM. Section 91.215(c), "ATC Transponder and Altitude Reporting Equipment and Use," requires an aircraft in controlled airspace, if it has an operable ATC transponder, to operate the transponder, and to reply on the appropriate code or as assigned by ATC. Section 99.7 requires compliance with special security instructions, issued by the Administrator in the interest of national security by agreement with the Department of Defense or a Federal security or intelligence agency, in addition to other rules in Part 99, "Security Control of Air Traffic," when operating in an ADIZ (air defense identification zone).

respondent did not comply with the operating requirements of NOTAM 3-2126 (Exh. A-1), in effect for the airspace within the Washington, D.C. Air Defense Identification Zone (the ADIZ). The Administrator alleged that, by entering said airspace without complying with those requirements, respondent risked interception by military aircraft and the possible use of deadly force and, further, that such operation was careless or reckless so as to endanger the life or property of another.

At the hearing, the Administrator called four witnesses and presented 12 exhibits. The first witness, an FAA specialist in planning and architecture for air traffic operations airspace and aeronautical information management, George Bobik, testified that NOTAM 3-2126, identifying the airspace comprising the ADIZ, was in effect on July 10, 2004. Tr. at 46-48. A statement from a domestic events network (DEN) specialist working at the Potomac Terminal Radar Approach Control (hereafter PCT), confirms that N27GS departed MTN without transmitting its assigned discrete transponder code, as required by NOTAM 3-2126. As a result, the specialist produced two "Target of Interest Tracking Forms," at 1500 hours at 1642 hours on July 10, 2004, documenting the details of the outbound and inbound portions of respondent's flight. Exhs. A-7, A-8, A-9; Tr. at 83, 85, 92-94. The local air traffic controller at MTN provided a statement explaining how he became aware of the alleged initial ADIZ penetration, how he notified respondent via the radio that N27GS was not transmitting its assigned discrete transponder beacon code, and that "the pilot" acknowledged his

failure to squawk the required discrete beacon code, but said "now he was." Exh. A-3; Tr. at 68, 81-82.

FAA Quality Assurance Specialist Dawn Ramirez, identified a Preliminary Pilot Deviation Report, Form 8020-17, documenting the observation, identification, and tracking of respondent's aircraft when it failed to transmit an assigned discrete code. This report contains a detailed description of the incident. Exh. A-5; Tr. at 57, 62. Ms. Ramirez also identified radar data and related radar plots showing the course flown by N27GS as it penetrated the ADIZ. Exh. A-6; Tr. at 64-72. She testified that the radar data and graphic plots of that data obtained from PCT and the National Capital Region Command Center show that N27GS departed MTN, situated within the geographical boundaries of the AIDZ, thereby entering the ADIZ without transmitting its assigned discrete beacon code. Tr. at 62, 66-67; Exh. A-6. Ms. Ramirez testified that N27GS flew south for 10 miles, exited the ADIZ, was out of the ADIZ for an hour and 40 minutes, and then re-entered without first establishing and maintaining two-way radio communication with PCT or squawking an assigned, discrete transponder code. Tr. at 62-63, 82, 85; Exh. A-5. She also testified that the local air traffic controller radioed N27GS upon its return to MTN, and advised "the pilot" to call PCT's pilot deviation line. Tr. at 60. The transcript of the air traffic control (ATC) tape confirms that respondent called the PCT ADIZ specialist, giving his name as "David Moeslein." Exhs. A-14 at 73-74, A-15.

FAA Air Traffic Security Coordinator Carol Might testified that she coordinates security incidents in the national airspace system with other agencies, including the Department of Defense, the Department of Homeland security, Customs, and other Federal, State, and local agencies, mostly over the DEN. Tr. at 110. She described a "target of interest" as one that is "not conforming to NOTAM 3-2126, meaning somebody who is not squawking a discrete code," and a "primary target" as one approaching the ADIZ or one that "pops up already in the ADIZ," and testified that on July 10, 2004, N27GS was both. Tr. at 115. Ms. Might said that when everyone on the DEN agrees that a target has been identified, numerous agencies involved in monitoring the ADIZ consider many factors in a rapid, simultaneous, manner. Id. She said that such factors include the trajectory, altitude, and speed of the aircraft; the day's intelligence reports; and the current location of VIP "assets." Ms. Might testified that if fighter aircraft are launched into the airspace with civil aircraft, the impact on the airspace is significant, and that an aircraft's failure to comply with NOTAM 3-2126 by not transmitting a proper discrete code instigates numerous processes. Tr. at 117-22. Moreover, Ms. Might testified that these numerous processes were put into play during the outbound leg of N27GS's flight on July 10, 2004, and that the return leg resulted in "almost the same thing." Tr. at 121, 123.

Aviation Safety Inspector John Cumberpatch opined that respondent was the PIC on this flight, and testified that respondent gave flight instruction during the flight, signed the student pilot's logbook

as CFI (certified flight instructor), also listing his own ATP status, and noted the time was logged as dual PIC time. Mr. Cumberpatch suggested that this meant that the student logged PIC time, even though the instructor was the actual PIC. Tr. at 200-02; Ehx. A-13 at 26.

Respondent did not appear at the haring.[3] His counsel chose not to proceed at the conclusion of the Administrator's case and did not present witnesses. During cross-examination of Mr. Cumberpatch, respondent's counsel presented Exhibit R-1 (also admitted as Exh. A-14), the deposition of Dr. Gruen, the other pilot on the flight.[4] Tr. at 181-85. Respondent's counsel argued that Dr. Gruen rented the aircraft, operated it at all times, and "received a briefing from Flight Services and... filed a flight plan in his name." Respondent's Appeal Br. At 10. At the conclusion of the Administrator's case, respondent's counsel offered Exhibits R-2, a filing pursuant to the

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[3] Respondent's counsel said respondent had been in a hospital for 2 months, following a cancer operation; the Administrator's counsel related that he was completely unaware of this. Tr. at 10. Respondent's counsel stated that respondent was "an elderly man," giving 73 as his age. Tr. at 11. The Administrator's counsel said that the record indicated that respondent was about 47 years old, "born in 1959." Tr. at 12. We discuss below whether the Administrator named the proper respondent.

[4] Dr. Gruen testified about his relationship with respondent and about the subject flight, starting from when he rented the aircraft from Phoenix Aviation. The purpose of the flight was for Dr. Gruen to practice for his commercial pilot certificate check ride. Exh. R-1 at 7. Dr. Gruen testified that he did receive instruction during the flight. Id. at 14-15.

Aviation Safety Reporting Program (ASR).[5] Tr. at 203-04.

After considering the evidence, the law judge held that respondent violated the FARs as alleged. Initial Decision at 224. The law judge rejected respondent's affirmative defense that he was eligible for a waiver of sanction based on his filing of an ASRP report, finding that the violations were not inadvertent. Id. at 221.

Respondent presents a variety of arguments on appeal. He argues that the law judge erred by permitting the Administrator to amend the complaint at the hearing, and by finding that respondent was the PIC. He also argues that the law judge erred when he found that there were two unauthorized penetrations into the ADIZ and when he found that respondent's actions were not inadvertent for purposes of the ASRP. Finally, he argues that the law judge erred by affirming a suspension for a person who "flies for a living," in violation of the Equal Protection Clause of the

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[5] Under the ASRP, sanction may be waived, despite the finding of a regulatory violation, if certain requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c. This program involves filing a report with the National Aeronautics and Space Administration (NASA) concerning a FAR violation. Such filing will obviate imposition of sanction if: (1) the violation was inadvertent and not deliberate; (2) it did not involve a criminal offense; accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in an enforcement action to have committed a regulatory violation in the past 5 years; and (4) the person mails a report of the incident to NASA within 10 days.

United States Constitution,[6] and by finding that safety in air commerce or air transportation and the public interest required affirmation of the suspension. In turn, the Administrator opposes each of these arguments, and urges us to affirm the law judge's decision.

Respondent challenges the law judge's actions in suggesting and then allowing the Administrator to amend the complaint by adding the suffix "Jr." to respondent's name and by correcting the certificate number from 2695586 to 2694486. Respondent's Appeal Br. At 9-10; Tr. at 14-17. With regard to amending pleadings, the Board's Rules of Practice, at 49 C.F.R. § 821.12(a), state that amendment of a pleading within 15 days before the hearing "shall be allowed only at the discretion of the law judge." Before that time, a party may amend by filing the amended pleading with the Board and serving copies on all parties. See 49 C.F.R. § 821.12(a). The Rule also provides that, in the case of an answerable pleading, the law judge shall allow any adverse party a reasonable time to object or answer. Finally, the rule requires amendments to complaints to be "consistent with the requirements of 49 C.F.R. § 44709(c) and 44710(c)."[7]

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[6] U.S. Const. Amend. XIV, § 1 (stating, "[N]or shall any State...deny to any person within its jurisdiction the equal protection of the laws.")

[7] Before issuing an order taking action against an airman's certificate after conducting a reinspection, reexamination, or other investigation, § 44709(c) requires the Administrator to advise the certificate holder of the reasons on which the Administrator relies and to provide the holder an opportunity to answer the charges and be heard why the action

Respondent argues that this amendment "chang[ed] the individual being charged in the Order of Suspension to another individual," and denied him due process of law. Respondent's counsel raised this issue at the hearing, but was at first unclear, stating, "I would rather not commit myself, Your Honor, until the Government puts their case on." Tr. at 12 (referring to discussion of the issue of whether the Administrator named the appropriate respondent). Answering the law judge's inquiry into why counsel did not notify the Administrator regarding the status of his client, respondent's counsel stated that he had two clients, who were father and son. He said that David Lee Moeslein "is the father," and "[m]y defense is they've named the wrong party. The party they're claiming is David Lee Moeslein, Jr." Tr. at 14. The Administrator disputes this defense, pointing out that the elder Moeslein is not a certificate holder and that respondent was the only certificated pilot, holding certificate number 2694486, living at his address of record in Maryland when the Notice of Proposed Certificate Action (NOPCA) was mailed there on December 17, 2004 (the correct certificate number was used in the NOPCA) Administrator's Reply Br. At 11; Tr. at 31, 145-49, 178; Exh. A-14. The Administrator also points out that, although the certificate number was subsequently incorrect (2695586) on the order of suspension and the complaint, respondent was also the only certificated Moeslein at his new address of

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should not be taken. This procedure was followed in this case. See footnote 8 infra. Likewise, § 44710(c) provides the same protection for revocation of airman certificates for controlled substance violations.

record in Ohio when the Administrator mailed the documents to him. Administrator's Reply Br. at 12.

We have held that minor corrections to a complaint that cause no surprise and do not prejudice a respondent do not constitute error.[8] Here, respondent has not provided any evidence of prejudice, nor have we found any. He received notice of certificate action and had an opportunity to prepare a defense and present arguments on the matter.[9] There is no question that David Lee Moeslein, Jr. received notice of the certificate action against him and that he was the correct party to

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[8] See Administrator v. Rogers, 2 NTSB 428, 428-29 (1973) (no abuse of discretion when the Administrator amended complaint at start of hearing; amendment was correction of date: "correct date was within the knowledge of respondent; therefore, the...amendment could not have been a surprise and could in no way have prejudiced respondent") (internal citation omitted); and Administrator v. Baer, NTSB Order No. EA-4619 at n.5 (1998) (the Administrator changed "bulletin" to "manual"; Board said that even if the ruling was in error, "there is no evidence of prejudice to respondent").

[9] Our review of the case file reveals that, on September 23, 2004, respondent received a letter of investigation (Exh. A-12 at 46); that the order of suspension and the complaint were sent to his correct addresses of record; and that he filed a notice of appeal, an answer to the complaint, and a request for discovery on September 6, 2006, and filed an amended answer on September 25, 2006. On November 21, 2006, respondent requested a continuance of the hearing from December 12, 2006. The file also reveals that on December 13, 2006, he requested issuance of subpoenas and amended that request on December 29, and that, on or about December 14, 2006; he submitted a response to discovery.

receive it.[10] The record indicates that respondent had notice of the charges against him and of the dates and place of the hearing, that an attorney represented him, and that he had the opportunity to present evidence and cross-examine witnesses, yet chose not to mount a meaningful defense at the hearing. We note, however, that respondent's counsel cross-examined the hearing witnesses and attended Dr. Gruen's deposition.[11]

Respondent also argues that the law judge erred by finding that respondent was PIC, given the evidence that Dr. Gruen operated the aircraft. In his deposition, Dr. Gruen said, "If a violation was committed then, yes, I committed it ... I was flying the place and I was in control of the airplane." Respondent's Appeal Br. at 10. In a reverse factual situation, we granted a student pilot's appeal in Administrator v. Rajaratnam, NTSB Order No. EA-3497 (1992), based on the other pilot's statement that, as the senior pilot, he would have taken over command in an emergency situation, holding that:

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[10] Respondent's counsel also states that the "failure to provide proper safeguards to an individual is a violation of due process and equal protection of the law." Respondent's Appeal Br. at 10. We have previously held that, where a respondent has had the opportunity to present and cross-examine witnesses at the administrative hearing, he has not been denied due process of law, as established by the Fifth Amendment. See Administrator v. Nowak, 4 NTSB 1716 (1984); Administrator v. Logan, 3 NTSB 767, 768 (1977); Administrator v. Smith, 2 NTSB 2527, 2528.

[11] See Administrator v. Raab, NTSB Order No. EA-5300 at 3 (2007).

> [W]hile respondent may have been the pilot in charge of the physical management of the aircraft, [the other pilot] was the pilot who possessed the ultimate responsibility for the safety of the operation.... [That] made him the PIC, as that term is defined in the FAR.

Id. at 9. In the instant case, respondent concedes that, after the flight, he contacted ATC "on behalf of Dr. Gruen," but argues that "does not make a person [PIC]." Respondent's Appeal Br. at 10. Dr. Gruen testified that he did not make the phone call because respondent "didn't tell me to do it." Exhs. R-1, A-14 at 74; Tr. at 190. When respondent called the FAA pilot deviation line, he identified himself as the pilot, and did not mention a second pilot. Exhs. A-15, A-16; Initial Decision at 222; Tr. at 162. Although not answering the question of who physically flew the airplane, it indicated that respondent had "final authority and responsibility for the flight."[12] Furthermore, we have long held that an instructor is

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[12] Title 14 C.F.R. § 1.1 defines "pilot in command," stating it means the person who:

> (1) Has final authority and responsibility for the operation and safety of the flight;
>
> (2) Has been designated as pilot in command before or during the flight; and
>
> (3) Holds the appropriate category, class, and type rating, if appropriate, for the conduct of the flight.

always the PIC on an instructional flight,[13] and that the PIC is not necessarily the pilot who operates the controls or directs the course of the flight.[14] We have also held that the PIC is the individual who has overall responsibility for and control of the flight.[15]

Dr. Gruen held a private pilot certificate, had 500 flying hours, and was working toward a commercial pilot certificate; respondent had over 7,000 hours and was an ATP and a CFI. Tr. at 157, 181; Ehx. A-12 at 11. We have held that an ATP is "held to the highest degree of care," and must accept responsibility for the events of the flight.[16] Here, respondent and Dr. Gruen had a well-established instructor/student relationship. Dr. Gruen received many hours of flight training from respondent. Tr. at 181; Exhs. A-14 at 16-22, A-13 at 15, 17, 20-21, 26-41.

Although testifying that respondent never touched the controls, when Dr. Gruen described practicing emergency procedures, he said that, while instructing him, respondent "would pull the throttle"

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13 See Administrator v. Hamre, 3 NTSB 28, 31 (1977) ("Regardless of who is manipulating the controls of the aircraft during an instructional flight, or what degree of proficiency the student has attained, the flight instructor is always deemed to be the pilot-in-command.") see also Administrator v. Strobel, NTSB Order No. EA-4384 (1995).

14 Administrator v. Jeffreys, 4 NTSB 681, 682 (1982); see also Administrator v. Funk, NTSB Order No. EA-2915 (1989).

15 Administrator v. McCartney, 4 NTSB 925, 926 (1983).

16 Administrator v. Kimsey, NTSB Order No. EA-4537 at 3 (1997).

to initiate the emergency procedure. Exhs. R-1 at 34, A-13 at 26. That there was no designation of PIC by agreement between the flight participants only exacerbates respondent's position. As an ATP and CFI, respondent had the responsibility to make sure that he and the participants in the flight agree on such a designation of PIC. This, along with our holding that the instructor is always the PIC, promotes safety by avoiding confusion in the cockpit.[17] Although the law judge did not "fully explain his rationale for determining that respondent was pilot-in-command,"[18] given our existing precedent on this issue, we find that the Administrator has established that respondent was the PIC during the flight. We also comment on respondent's duty to exercise the highest standard of care as an ATP, and that his acquiescence, or even worse his obliviousness, to such violations was inexcusable.[19] The Administrator properly pursued this action against respondent.

Respondent next argues that the law judge erred in finding there were unauthorized ADIZ penetrations on the flight at issue. Respondent's Appeal Br. at 11. Given the lengthy testimony and evidence that the Administrator presented at the hearing, we find this argument without merit. See Tr. at 57-108, 115-136, 140-202; Exhs. A-1, A-3, A-5,

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17 See Administrator v. Walkup, 6 NTSB 36, 37 (1988).

18 See id. at 39.

19 See Administrator v. Peacon, NTSB Order No. EA-4607 at 15 (1999).

A-6, A-7, A-8, A-9, A-12, A-14, A-15, A-16. Further discussions regarding this argument is unnecessary.

Respondent also argues that the law judge erred when he did not "accept" respondent's filing of a report under the ASRP. Specifically, respondent argues that the FAR violations he committed were inadvertent. Respondent's Appeal Br. at 11. We have long treated a respondent's assertion that he is eligible for a waiver of sanction under the ASRP as an affirmative defense.[20] Moreover, in asserting an affirmative defense, the respondent must fulfill his or her burden of proving the factual basis for the affirmative defense, as well as the legal justification.[21] Therefore, based on this standard, respondent must fulfill his burden of establishing that he has met all criteria of the ASRP, and is therefore eligible for a waiver of sanction. Here, respondent has not met this burden; respondent did not present evidence to prove that he fulfilled all four criteria,[22] and instead argues only that his violation was inadvertent. Respondent also has not produced sufficient evidence to dispute the law judge's assessment that the violations were not inadvertent. As such, we do not find that respondent is eligible for a waiver of sanction under the ASRP.

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20 Administrator v. Smith, 5 NTSB 1560, 1564 (1986).

21 See Administrator v. Gibbs, NTSB Order No. EA-5291 at 2 (2007); Administrator v. Kalberg, NTSB Order No. EA-5240 at 3 (2006); Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994).

22 Supra at n.5.

In addition to the due process argument addressed above, respondent presents a further Constitutional argument, stating that a 90-day suspension for a "person that flies for a living...would cause a great hardship" and that the imposition of such sanction would constitute a violation of the Equal Protection Clause. Respondent's Appeal Br. at 12. We have repeatedly expressed the view that, "such considerations are not a proper basis for modifying an otherwise legitimate sanction."[23] Furthermore, respondent makes "no showing that the sanction amount is inconsistent with precedent."[24]

Finally, respondent argues that the law judge erred "in finding that the safety in air commerce or air transportation and the public interest requires the affirmation of the Administrator's Order of Suspension." Respondent's Appeal Br. at 13. Respondent reasons that the Administrator's policy regarding air defense identification zones deals with security, and not safety. Id. A challenge as to whether a particular FAR violation amounted to an unsafe action was raised in the case of Administrator v. Good, NTSB Order No. EA-5026 at 3-4 (2003), where we said:

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[23] Administrator v. Basco and Koch, NTSB Order No. EA-4788 at 2 (1999), citing Administrator v. Van Ovost, NTSB Order No. EA-4681, n.9 (1998).

[24] Id.

> The difficulty with respondent's arguments is that we are not here to make abstract determinations about whether we think a particular action is "safe;" or if one action is safer than another. Our role here is to promote air safety by adjudicating alleged violations of the FARs, and we do so by reviewing the elements of the cited rule and the facts that are established on the record. As a matter of law, except perhaps in a most unusual circumstance no present here, a violation of the FARs involving operational requirements is, by definition, an unsafe aviation practice.

Overall, we find that the safety in air commerce or air transportation and the public interest require us to affirm the order of suspension and the decision of the law judge.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's initial decision is affirmed; and

3. The 90-day suspension of respondent's airline transport pilot certificate, and any other pilot certificate now held by respondent, shall begin 30 days after the service date indicated on this opinion and order.[25]

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[25] For the purpose of this order, respondent must physically surrender his certificate to a representative of the

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1211 **September Term, 2008**
FILED ON: MAY 5, 2009

DAVID LEE MOESLEIN, JR.,
PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION,
RESPONDENT

On Petition for Review of an Order
of the Federal Aviation Administration

Before: GINSBURG, HENDERSON and KAVANAUGH, *Circuit Judges*

JUDGMENT

This petition for review was considered on the record from the Federal Aviation Administration (FAA) and the briefs filed by the parties pursuant to D.C. Circuit Rule 34(j). It is

ORDERED that the petition for review is denied.

The FAA suspended David Moeslein's pilot certificate for 90 days for violating a Notice to Airman (NOTAM) when he, as pilot-in-command of an instructional flight, twice unlawfully penetrated the D.C. Metropolitan Area Air Defense Identification Zone (ADIZ) by failing to squawk an appropriate transponder code upon takeoff from and

when returning to a Maryland airport. On appeal, the National Transportation Safety Board (NTSB) upheld the suspension. Moeslein now argues that the NTSB failed to rely on substantial evidence and/or arbitrarily and capriciously affirmed the findings of the FAA's administrative law judge (ALJ).

First, the NTSB reasonably concluded that Moeslein acted as the flight instructor during the flight, *see, e.g.*, Gruen Depo. at 6-17, and thus was operating the aircraft as the pilot-in-command. *See Administrator v. Hamre*, 3 N.T.S.B. 28, 31 (Jan. 17, 1977) ("Regardless of who is manipulating the controls of the aircraft during an instructional flight . . . the flight instructor is always deemed to be the pilot-in-command."). Second, ample evidence supported the finding that there were two unauthorized penetrations of the ADIZ. *See, e.g.*, JA 78-88, 92-100, 140-53, 177-81, 327-28. Third, given Moeslein's experience flying in the ADIZ and the fact that the transponder twice correctly functioned after Moeslein was informed to switch it to the correct channel, the NTSB reasonably found that he did not act inadvertently. In any event, Moeslein failed to establish the applicability of a sanction waiver under the Aviation Safety Reporting Program (ASRP). FAA, *Aviation Safety Reporting Program*, Advisory Circular 00-46D at ¶ 9(c) (Feb. 26, 1997); *see Administrator v. Smith*, 5 N.T.S.B. 1560, 1564 (Nov. 13, 1986) (waiver of sanction pursuant to ASRP "constitutes an affirmative defense").

Moeslein's remaining arguments are also without merit. The ALJ did not abuse his discretion in allowing the FAA to amend the complaint.

Moeslein had notice that the initial complaint had been directed to him notwithstanding the typographical errors therein (i.e., failure to include "Jr." and listing Moeslein's certificate number as 2695586, not 2694486). The complaint was based on and issued after the Notice of Proposed Certificate Action, which had been sent to his residence, listing the correct certificate number, and Moeslein was the only certified pilot at that address. Thus, these errors "could not have been a surprise and could in no way have prejudiced" Moeslein. *Administrator v. Rogers*, 2 N.T.S.B. 428, 429 (Aug. 1, 1973). Moreover, Moeslein's 90-day suspension notwithstanding his alleged loss of income resulting therefrom was appropriate given that "'[financial hardship] considerations are not a proper basis for modifying an otherwise legitimate sanction,'" *Administrator v. Basco & Koch*, NTSB Order No. EA-4788 at 2 (Sept. 8, 1999), and the two violations here can support a maximum suspension of 180 days. Nor was it unreasonable for the NTSB to conclude that safety and the public interest require the suspension. As noted by the NTSB, except in the "most unusual circumstance[s]," violations of operational requirements contained in the federal aviation regulations are "[a]s a matter of law . . . unsafe aviation practice[s]." *Administrator v. Good*, NTSB Order No. EA-5026 at 1 (Mar. 3, 2003). Here, the circumstances are plainly not "most unusual" inasmuch as "by entering the effected [sic] airspace without complying with the operating requirements and procedures specified in the [] NOTAM, [Moeslein] risked interception by military aircraft and the possible use of deadly force." JA 248; *see also id.* at 149-50.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail

Michael C. McGrail
Deputy Clerk